IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.2788 OF 2007
AND
CIVIL APPLICATION NO.2787 OF 2007
IN
WRIT PETITION NO.4116 OF 2007

Mr.Furdoon Maneckshaw Daroowala ..Petitioner.

V/s.

Mr.K.M.Gherda & Ors. ..Respondents.

AND

Keki Parvez Irani ..Applicant.

Mr.A.A.Patel i/b. M.A. Patel for applicant.

Ms.Laxmi G. Vora for respondent Nos.1 to 5.

CORAM : J.P.DEVADHAR, J.

DATED : 30TH NOVEMBER, 2007.

P.C. :-

1. These two Civil Applications are taken out by the applicant for bringing him on record as legal heir of the deceased petitioner and for restoration of the Writ Petition which was dismissed for default on 6th July, 2007.

2. Some time in the year, 1962 the Trustees of Bai Hirabai Tata Memorial Trust (respondent Nos 1 to 5) had allotted flat No.3, Lady Dorab Tata Building No.2, Tata Blocks, S.V.Road, Bandra, Mumbai-400 050 (‘suit premises’

for short) to the petitioner on a monthly tenancy basis.

3. RAE Suit No.2198 of 1987 was filed by the said Trustees in the Small Causes Court at Mumbai against the petitioner for possession inter alia on the ground that the petitioner had sublet the suit premises. On 11th June, 2005 the said suit was decreed ex-parte and in execution of the said decree, possession of the suit premises was taken on 30th September, 2005. It is contended by the Trustees that the suit premises has already been allotted to a third party.

4. On 7th December, 2005 the petitioner filed an application in the Court of the Small Causes at Mumbai for setting aside the ex-parte decree. The said application was dismissed on 7/06/2006. Appeal filed against that order was also dismissed on 12/12/2006. Thereafter, the petitioner filed Writ Petition No.4116 of 2007 challenging the aforesaid orders.

5. During the pendency of the said Writ Petition, the petitioner died on 29th June, 2007. On 6/7/2007 the said Writ Petition was dismissed for default.

6. By these two applications, the applicant claiming to be legal heir of the deceased under a

registered Will seeks an order for being brought on record as legal heir of the deceased petitioner in Writ Petition No.4116 of 2007 and for restoration of the said Writ Petition which was dismissed on 6th July, 2007 for default.

7. It is contended on behalf of the applicant that even though the Will is not probated, the applicant is entitled to prosecute the Writ Petition as a legal heir of the deceased petitioner. It is contended that the ex-parte decree passed by the Small Causes Court was liable to be set aside because, firstly proper notice of transferring the suit filed by the trustees against the petitioner from Mumbai to Bandra Court was not given to the deceased petitioner. Secondly, the petitioner did not attend the Court from time to time because, his advocate had assured to look after the matter properly and for the negligence of the advocate of the petitioner / legal heir should not be made to suffer. Thirdly, due to illness the petitioner was required to stay at the relevant time at Hyderabad. Accordingly, it is submitted that if the petition is not restored grave injustice would be caused to the applicant who is the legal heir of the deceased petitioner.

8. The learned counsel for the Trustees of the

Trust has opposed the applications by submitting that the petitioner was a bachelor and had no legal heirs. It is contended that the petitioner was only a tenant and the same could not be bequeathed by executing a Will. In any event, the suit premises have already been allotted to a third party and hence the applications are liable to be dismissed.

9. After considering the rival contentions, I find it difficult to accept the arguments advanced on behalf of the applicant, because, it is well established that tenancy cannot be bequeathed by executing a Will and in the present case suit filed by the Trustees of the Trust on the ground that the petitioner has illegally sublet the suit premises has already been decreed and the same has been executed on 30/9/2005 and third party rights have also been created. It may be that the applicant is entitled to the estate of the deceased petitioner under the Will allegedly executed by the petitioner but that would not be applicable to the tenancy of the deceased which is already terminated, a decree to that effect has been passed and in fact possession has also been taken.

10. In this view of the matter, both the Civil Applications are dismissed with no order as to costs.

(J.P. DEVADHAR, J.)